

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
TRENTON DIVISION

IN RE: ) Docket No. 3:16-md-02738-MAS-RLS  
)  
) Courtroom 7W  
) Clarkson S. Fisher Building  
JOHNSON & JOHNSON TALCUM ) & U.S. Courthouse  
POWDER PRODUCTS MARKETING, ) 402 East State Street  
SALES PRACTICES, AND PRODUCTS ) Trenton, New Jersey 08608  
LIABILITY LITIGATION. )  
) April 5, 2024  
) 12:33 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE REGARDING DISCOVERY  
DISPUTES SET FORTH IN DOC NOS. 31044 AND 31070  
BEFORE HONORABLE RUKHSANAH L. SINGH  
UNITED STATES MAGISTRATE JUDGE

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1 THE COURT: This is Judge Singh. We are on the  
2 record and recording the line in the matter of In Re Johnson &  
3 Johnson Talcum Powder Products Marketing, Sales Practices, and  
4 Products Liability Litigation, bearing Docket Number 16-md-  
5 2738.

6 I understand we have a number of people on the phone  
7 today; how are you all?

8 UNIDENTIFIED ATTORNEY: Very good; thanks, Your  
9 Honor.

10 UNIDENTIFIED ATTORNEY: Very good. Good morning.

11 THE COURT: Good morning.

12 So I will ask, if you are speaking to please state  
13 your name so that it's clear for our recording. The Court set  
14 this call on short notice because I received the letter dated  
15 April 3rd, 2024 from Fox Rothschild on behalf of the Beasley  
16 Allen Law firm and Andy D. Burchfield, Jr., Esquire.

17 And I also received the response filed by O'Melveny  
18 on April 4th, 2024 regarding the subpoenas that have gone out  
19 to the mediators. And I understand there has been outreach to  
20 those three individuals who received the notices of the  
21 subpoenas, and they have agreed to respond by Monday. Is that  
22 correct, Mr. Brody?

23 MR. BRODY: Yes. And for the record, this is Steve  
24 Brody. Yes, Your Honor, that's correct.

25 THE COURT: Okay. So, Mr. Pollock, I set up this

1 call initially in response to your letter, so what would you  
2 like to do?

3 MR. POLLOCK: Your Honor, I'm going to end and begin  
4 that this is really within your sound discretion. I am put in  
5 a box because the -- obviously we're shortening the time  
6 frame. We'd have the right normally upon written question to  
7 ask additional questions. We're treading on the fine edges of  
8 the mediation privilege, if not trampling on it. And I'm  
9 worried that the most these questions really do, even our own  
10 questions, really is give the Court, at best, a bias picture,  
11 so I'm worried about that. Because obviously, this is a  
12 significant issue, apparently, I'm sure it'll come  
13 (indiscernible). And it's troubling, because I don't want the  
14 Court to have a distorted picture.

15 I can't formally object and say no, because if I do,  
16 J&J is going to say, "Well, they're running from the truth,"  
17 or you've got an adverse instance and it wouldn't allow the  
18 discovery.

19 And the last point I'll raise is that it is odd that  
20 you've asked directly, and Judge Porto asked directly, "Do we  
21 need more evidence?" And even yesterday, Mr. Brody, who's on  
22 the phone, said, "We think we've proven our case with the two  
23 J&J guys, we don't need this additional stuff, but Judge Porto  
24 asked for it, so we're going to go forward."

25 So I'm going end and be quiet at this point, I'm

1 going to leave it to your sound discretion. You can  
2 understand why I'm in a box because I, frankly, object to it,  
3 but I'm not going to die on this mountain.

4 THE COURT: Okay; understood.

5 Mr. Brody, would you like to respond?

6 MR. BRODY: Yes. And I'll be brief, Your Honor. I  
7 mean, the reason we're here is because of the questions that  
8 were put to Mr. Murdica during the evidentiary hearing on the  
9 25th of March. And obviously, we're having the evidentiary  
10 hearing because Judge Porto initially -- and Your Honor joined  
11 in making this a joint hearing. Judge Porto indicated in his  
12 January 30th opinion that he felt he needed the evidentiary  
13 hearing in order to make his decision.

14 And so, you know, the idea that this is somehow, you  
15 know, outside the bounds of what we're addressing, I think, is  
16 incorrect.

17 And, two, it's something that was injected into the  
18 proceedings through questioning by Mr. Pollack on behalf of  
19 Mr. Birchfield and Beasley Allen. And obviously we need to be  
20 in position to address things that have been raised in the  
21 hearing. You know, our assumption is that Beasley Allen  
22 introduced this into the hearing because it felt that it was  
23 an important fact, or important facts, that it wanted to  
24 develop and eventually argue against the disqualification  
25 motion that's been filed by the defendants here.

1           So we're in a situation where, you know, obviously  
2 there is a need to shorten the time in order to receive the  
3 answers to the depositions upon written question prior to the  
4 continuation of the hearing. And, you know, everybody is  
5 committed to completing the hearing on Wednesday of next week  
6 on April 10th.

7           Fortunately, it's a very discrete issue. I don't  
8 think there's any -- certainly can't be any basis to claim  
9 mediation privilege when the question was put by Mr. Pollock  
10 to Mr. Murdica about this very issue.

11           And so, unfortunately, we are in a situation where  
12 the mediators have agreed that they will provide their  
13 responses on Monday. You know, the way that will work is a  
14 court reporter authorized to certify the responses will go to  
15 them, will take down that information, certify their  
16 responses, and then we can arrange to have the court reporter  
17 transmit those responses to all counsel at the same time, and  
18 then all counsel will have it. And then, of course, whether  
19 either side actually uses -- ultimately uses that information  
20 in the hearing or not is something that will play out on  
21 Wednesday of next week.

22           So I think it's -- I think it's fairly  
23 straightforward at this point, and, you know, we have the  
24 questions that Beasley Allen wishes the mediators to answer.  
25 We can add those, and I'm happy to work with Mr. Pollock to

1 put those into a single document so that a single document can  
2 be presented to the mediators for certification when they  
3 complete the deposition on written question on the 8th.

4 THE COURT: Okay.

5 MR. POLLOCK: May I respond, Judge?

6 THE COURT: Yes, please. Go ahead.

7 MR. POLLOCK: Just very briefly. One, this is a  
8 plenary hearing, not a full-blown trial. And so if, in an  
9 ordinary course, I ask a question, you wouldn't say "stop the  
10 proceeding, let me issue some subpoenas and get some more  
11 witnesses in here to respond." So we're taking it away from  
12 the plenary basis that it was supposed to be to something  
13 else.

14 Two, the fact is that I am concerned that the  
15 questions -- when I asked those questions, I did not ask and I  
16 was -- I'm very aware of the mediation privilege,  
17 unfortunately having wasted too much of my limited lifespan  
18 litigating the issue. I did not ask "what was discussed?" I  
19 asked who attend, you know, where did it start from. But I  
20 didn't ask what was discussed during the course. There's no  
21 confidential information disclosed, and I didn't invite that.

22 The last point that I would raise is that if we ask  
23 these questions, I will raise this again before Judge Porto,  
24 and I'm being candid with you. I do question if this is the  
25 right vehicle I wish to even get the information that J&J

1 really wants because it could paint a bias picture.

2 That said, I'm going to end where I started; it's up  
3 to you.

4 THE COURT: Okay. Does anyone else wish to be  
5 heard?

6 (No audible response)

7 THE COURT: Okay. So this is what we're going to  
8 do. I am going to grant the request under Rule 31(a)(5) to  
9 shorten the time period, such that the questions and cross-  
10 questions may be posed to the three individuals who have  
11 received these notices. Do work together to provide a  
12 consolidated document, as suggested by Mr. Brody, so that it  
13 streamlines the process.

14 I understand that these three individuals, based off  
15 of representations from counsel, have consented to providing  
16 their respective responses by Monday, April 8th, 2024. So I  
17 am shortening the time period to that date for purposes of the  
18 responses.

19 As to the use of any information received in  
20 response to the three subpoenas, the Court is reserving.  
21 Let's see what the responses are. Let's see what the parties  
22 intend to use, if at all, at the upcoming hearing, and then  
23 we'll decide at that point, particularly because Judge Porto  
24 does not have the benefit of our dialogue today. It will give  
25 both Judge Porto and I an opportunity to determine in real



1 time based off of real responses, if any, what the applicable  
2 appropriateness of the use of any such response should be at  
3 the time.

4 Okay?

5 MR. POLLOCK: Thank you, Your Honor.

6 MR. PLACITELLA: Your Honor?

7 MR. BRODY: Thank you, Your Honor.

8 THE COURT: All right.

9 MR. PLACITELLA: Your Honor?

10 THE COURT: Yes, anything else?

11 UNIDENTIFIED ATTORNEY: Thank you.

12 MR. PLACITELLA: Yes, Your Honor, this is Chris  
13 Placitella. Good afternoon; how are you?

14 THE COURT: Hi; doing well. How are you?

15 MR. PLACITELLA: Good. I have an additional issue,  
16 if you have five minutes, to raise (indiscernible) motion  
17 practice.

18 THE COURT: Sure. What's going on?

19 MR. PLACITELLA: Unrelated to the hearing.

20 THE COURT: Okay.

21 MR. PLACITELLA: So six weeks ago, the parties  
22 agreed to the deposition of the hearing Dr. Kessler, who is a  
23 former FDA Commissioner, to take place in Washington, DC this  
24 coming Monday.

25 Four weeks ago, the deposition was noticed J&J for

1 this coming Monday.

2 On Tuesday, we got an email from counsel for J&J  
3 saying they're changing the deposition to remote. There was a  
4 discussion about that, that was after business hours. The  
5 next day, we said, fine, if you want to do it remote, but can  
6 you please send us two hard copies of the exhibits under seal,  
7 which we won't open until the dep starts so we can make the  
8 dep go smoothly?

9 J&J said, we're not doing that, we're not sending  
10 the documents, and we're doing it remote.

11 We then said, okay, you're not going to send the  
12 documents, can you at least send us a link when the deposition  
13 starts to make the deposition go smoothly?

14 J&J says, no, we're not going to do that.

15 We say, okay, well, as long as you conduct the  
16 deposition and give the -- and if you're going to send them  
17 one at a time, that's fine, you just need to give Dr. Kessler  
18 the opportunity to look at the document, and then answer any  
19 questions.

20 J&J then says, you know what, forget it. You wanted  
21 to do it in person, we're canceling the deposition, set it for  
22 another day.

23 We say no, that's not acceptable. Dr. Kessler has  
24 set the schedule out from his schedule. We've been prepping  
25 with him all week. Frankly, we paid him money to get ready;

1 I'm sure they'll ask him about that. We have a team -- we  
2 have multiple people traveling from different parts of the  
3 country, as we speak. I personally cleared my schedule,  
4 arranged my deposition schedule for my upcoming trial around -  
5 - from Judge Viscomi around this deposition, and now J&J is  
6 saying, "Well, sorry, why don't we just reschedule it in  
7 May?"

8 And, respectfully, this deposition should go  
9 forward. It's been scheduled for now over six weeks. There's  
10 people on planes, people have made hotel reservations, and  
11 it's simply not fair to pull the plug at this point in time  
12 with really, frankly, no good reason to do so.

13 THE COURT: Okay; I understand the concern.

14 Who would like to speak on behalf of J&J on this  
15 issue? Hopefully they're on the line.

16 MS. SHARKO: Yes, this is Susan Sharko. I had no  
17 idea Mr. Placitella was going to bring this up, so I don't  
18 have my notes. I'm in an airport there's a lot of background  
19 noise.

20 THE COURT: Oh, I see.

21 MS. SHARKO: But I'll do my best. So the  
22 depositions of the plaintiffs' experts, most of them have been  
23 adjourned and rescheduled for all kinds of reasons, including  
24 the plaintiffs' own issues many times. And we all work  
25 together and we come up with a suitable date. The Longo

1 deposition was adjourned; the Levy deposition was adjourned  
2 after people bought airplane tickets. And the depositions get  
3 adjourned and rescheduled. So that's the background.

4 Dr. Kessler is a professional witness. His expert  
5 report, you may recall from the motion to strike, is something  
6 like 132 pages long. He has never been deposed in this  
7 litigation. We have, unfortunately, only seven hours for the  
8 deposition. His reliance list is 87 or so single-spaced  
9 pages.

10 Our assessment was that it would be most efficient,  
11 because of all the documents, to do the deposition by Zoom.  
12 We let the plaintiffs know. All of these depositions, Judge,  
13 have Zoom link, and so most of the plaintiff lawyers appear by  
14 Zoom.

15 Ms. O'Dell responded and objected to that, and said  
16 they would only agree to that if we produced, like, within 24  
17 or 48 hours, paper copies of all the exhibits. That was  
18 impossible to do, and we said no.

19 And then -- I don't have all the emails in front of  
20 me, but their next condition was you can do it by Zoom, but  
21 you have to supply all the documents electronically  
22 beforehand. I mean, we're talking about boxes and boxes of  
23 documents.

24 So I said -- and I believe it was on Wednesday,  
25 fine, you know what, we agree, we'll do the deposition in

1 person, we'll bring all the documents, and we'll use paper,  
2 we'll do it the old fashioned way.

3 And the background is that in some of these  
4 depositions, for example, the deposition of Dr. Wolf, the  
5 first deposition, which was taken by Zoom, we tried to use  
6 documents electronically, and there were long breaks by the  
7 plaintiffs, and objections, that ate-up a lot of the time  
8 because they said they couldn't see the screen, or they wanted  
9 to see the whole document, not just the page on the screen,  
10 etc. So we have to pretty much reverted to doing these in  
11 person.

12 And so I said, fine, we'll do this in person. We  
13 can't get you all the documents electronically on this short  
14 notice. We can't get you all the paper copies. So we'll make  
15 ourselves available any day of the week of April 15 or April  
16 22. And the plaintiffs' response was the witness is not  
17 available until May.

18 And so, because we're now doing these depositions in  
19 the MCL cases and in the MDL cases, depositions have already  
20 been rescheduled into May. Dr. Levy, who was long set for, I  
21 think, last week, was moved at the plaintiffs' request to, I  
22 believe, May 8. And there's other depositions in May.

23 So if Dr. Kessler isn't -- is not available in  
24 April, we'll do it in May. But this is much ado about  
25 nothing. We have accommodated each other like grown-ups,

1 rescheduling depositions. You know, at this point I don't  
2 even lean on Ms. Parfitt or Ms. O'Dell as to, "okay, why do  
3 you need to reschedule it? You know, I already bought my  
4 airline ticket." I just say, "Okay, please get me some  
5 dates." And I expect that when we start deposing the defense  
6 experts, which will be probably as soon as May, because we're  
7 serving reports -- most of the reports tonight, that they'll  
8 extend the same courtesy to us.

9           So at this point, on Friday afternoon, we're not  
10 prepared to go forward, given all the back and forth on "you  
11 have to do this, you have to do that with the documents."  
12 And, frankly, I'm afraid that Dr. Kessler, being a  
13 professional witness -- and I've deposed him before, I know  
14 what he's like -- is going to say when a document goes up on  
15 the screen, "I can't see it. I want the whole document,"  
16 etc., etc. And with only seven hours to depose somebody on a  
17 132-page report, that's going to be impossible.

18           So, what I don't -- I guess really --

19           MS. PARFITT: Can I --

20           MS. SHARKO: -- what Mr. Placitella is asking for is  
21 to order us to go forward on Monday, and we object to that.  
22 We would like to reschedule the deposition.

23           Thank you.

24           MS. PARFITT: Mr. Placitella --

25           MR. PLACITELLA: Judge, may I be heard on that?

1 MS. PARFITT: This is Michelle Parfitt. Could I  
2 make one comment, Mr. Placitella, before?

3 MR. PLACITELLA: Sure.

4 MS. PARFITT: Thank you.

5 Judge Singh, this is Michelle Parfitt speaking on  
6 behalf of the plaintiffs' steering committee. And I and Susan  
7 have probably spent far more of our time orchestrating these  
8 depositions. I have been at every one, but maybe two, either  
9 defending or there. There have been quite a few that have  
10 been remote so far where defense -- I just took two  
11 depositions, or attended two, Dr. Cote and Siemiatycki, and we  
12 had remote court reporters and we had remote lawyers.

13 When this deposition was set up several weeks ago,  
14 it was coordinated and it was mediated, both time and date.  
15 It took for both sides -- Susan's absolutely correct, there's  
16 been give-and-take, certainly a lot of give that we've placed  
17 because of difficulties with defense, defense for plaintiffs.

18 But the bottom line is Dr. Kessler's deposition has  
19 been scheduled for weeks. Up until just days ago, they were  
20 ready to go. And yesterday, with a remote deposition,  
21 prepared to do that.

22 Because there was a little pushback, as it's been  
23 characterized, to get documents available, we basically said,  
24 "We'll move forward. Let's go. We've got to get these done."  
25 And that -- they were ready to go last week. Suddenly,

1 they're not ready to go this week. The deposition is supposed  
2 to be taken at my office. We are prepared. We are ready.  
3 We'll have all the accommodations that people needed. They  
4 could have been there in person or not in person.

5 The same preparation should have been ongoing weeks  
6 ago that apparently now they're shuffling around to try to  
7 accommodate. And there -- this isn't an accommodation. These  
8 have been extremely difficult to get done. They were ready  
9 weeks ago, they should be ready now. Nothing changed.

10 The last day were questions about how this would be  
11 conducted, and they have conducted them completely remotely  
12 without even a court reporter, me present by a witness, no one  
13 else in the room, and that even seemed to be fine with them on  
14 occasion, and then they've moved off it (indiscernible -  
15 background noise) put a lawyer and a court report. So it's  
16 gone both ways.

17 This deposition should go forward. Everyone is  
18 ready. Mr. Placitella has accurately stated that people have  
19 come -- changed their schedules, revise what they need to do  
20 with their other cases.

21 And Dr. Kessler is described as a professional  
22 witness? He is an expert that's been retained by the  
23 plaintiff, a former Federal Commissioner -- FDA Commissioner.  
24 And he is still a busy man. He gave up two years of his life  
25 to help the country with regard to the COVID response. So



1 it's not that he's not a busy human being and is just a  
2 professional witness that has time to spare.

3 And this -- and I think the concern is, Your Honor,  
4 is that we have spent a lot of time orchestrating this date,  
5 and it was agreeable, mutually agreeable to go forward. And  
6 it's only as a result of what happened in the last 24 hours,  
7 and suddenly the defendants can't be ready for this deposition  
8 in the last 24 hours, and they're using it as an excuse.

9 Plaintiffs requested that they simply try to  
10 accommodate a witness with regard to exhibits that could be  
11 used.

12 Mr. Placitella, I'm sorry, but I did feel the need  
13 to speak up because I've been involved in the planning  
14 process.

15 MR. PLACITELLA: No, that's -- that's fine. And I  
16 really hate to even raise this. It feels so petty, but the  
17 circumstances --

18 MS. PARFITT: Right.

19 MR. PLACITELLA: -- are just unexplainable. I  
20 personally have a trial scheduled the first week of May.  
21 Everyone has moved a lot of things around to make this happen.  
22 They can be there in person, they can do it on Zoom, but it  
23 needs to get done. And they're -- and they really haven't  
24 given a good reason not to do it, Your Honor, other than they  
25 don't want to do it. They have the documents. They can come

1 in person. They can do them however they want to do it. They  
2 have armies of lawyers. Skadden Arps, their national counsel,  
3 has an office literally two blocks away from this -- from Ms.  
4 Parfitt's office.

5 So, you know, this is -- this is not a heavy lift.  
6 But it is going to be difficult and, frankly, burdensome on a  
7 lot of people to just lift it at the last second with no real  
8 good reason. I'll keep quiet now. I apologize.

9 THE COURT: Okay. Thank you.

10 MS. SHARKO: The good reason, Judge -- the good  
11 reason, Judge, is that it's -- I'm very, very concerned about  
12 the games that are going to be played with the exhibits if  
13 they're used electronically. They've already foreshadowed  
14 that. And at this point --

15 MR. PLACITELLA: That's not true.

16 MS. SHARKO: -- you know, we can -- we can -- excuse  
17 me. I'm talking.

18 At this point, let's move the deposition to the  
19 following week, and we'll do it in person. We'll have all the  
20 documents in paper, like the plaintiffs demanded, and we can  
21 go forward.

22 THE COURT: So you're unable --

23 UNIDENTIFIED ATTORNEY: (Indiscernible - multiple  
24 speakers) next week.

25 THE COURT: Oh, okay.

1 UNIDENTIFIED ATTORNEY: (Indiscernible). Sorry.

2 THE COURT: That's all right. Ms. Sharko, are you  
3 unable to do the deposition in person on Monday?

4 MS. SHARKO: Yes, given the volume of paper we would  
5 have to bring.

6 MS. PARFITT: Could I get further explanation, Your  
7 Honor, on that? What's -- the office is literally blocks from  
8 my office. We will -- I will tell you, my office will make  
9 accommodations to help them bring their boxes, if that's what  
10 they need.

11 THE COURT: All right, this is what we're going to  
12 do. Proceed with the deposition on Monday in whichever format  
13 you can figure out. Honestly, I don't think I need to be or  
14 should be involved in these types of issues, but this case has  
15 to move forward. You have the issue before District Judge  
16 Shipp about anticipated Daubert motions, and I am aware of the  
17 pending motion for reconsideration as to the scope of those  
18 motions. We do need to move these things forward, so to the  
19 extent there's a request to move forward with the deposition  
20 on Monday, I am granting that request. I'm not compelling any  
21 particular format at this time. I'm leaving it up to counsel  
22 to make the appropriate judgment calls.

23 That being said, if you do proceed virtually and  
24 there's, let's say, something afoot with regard to exhibits,  
25 I'm here in the courthouse on Monday. Give me a call in real

1 time, and I will call balls and strikes for you as  
2 appropriate, and make directions to the witness, if necessary.  
3 Okey-dokey?

4 MR. PLACITELLA: Thank you; sorry.

5 MS. SHARKO: Thank you, Judge.

6 MS. PARFITT: Thank you, Your Honor.

7 THE COURT: Okay. All right, great. All right.

8 MS. PARFITT: Fine.

9 THE COURT: All right. Anything else while I have  
10 you then?

11 (No audible response)

12 THE COURT: All righty. Well, then I'll let you  
13 have the rest of your Fridays. Safe travels for those of you  
14 who seem to all be moving around. I hope you enjoy your  
15 weekend, at least in some fashion. Thank you for getting on  
16 the call on short notice. Take care.

17 MULTIPLE SPEAKERS: Thank you.

18 (Whereupon, the hearing adjourned at 12:58 p.m.)

19  
20 CERTIFICATE OF TRANSCRIBER

21 I, KAREN HARTMANN, a certified Electronic Court  
22 Transcriber, certify that the foregoing is a correct  
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24 /s/ Karen Hartmann Date: April 10, 2024  
25 Karen Hartmann, AAERT CET 475  
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